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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,

VS.

ALFONSO LOPEZ, JR.,
Respondent.

On Writ Of Certiorari to the Court of Appeals for the Fifth Circuit

AMICUS BRIEF ON BEHALF OF: ACADEMICS FOR THE SECOND AMENDMENT; SECOND AMENDMENT FOUNDATION; CONGRESS OF RACIAL EQUALITY; NATIONAL ASSOCIATIONS OF CHIEFS OF POLICE AND AMERICAN FEDERATION OF POLICE

AMICUS BRIEF SUPPORTING NEITHER PARTY

Counsel for Amici—

DON B. KATES, ESQ.
BENENSON & KATES
920 Arlene Way
Novato, CA 94947
Telephone: 415-883-5323

RANDY E. BARNETT, ESQ.
School of Law
Boston University
765 Commonwealth Ave.
Boston, MA 02215
Telephone: 617-353-3110

PATRICK J. BASIAL, ESQ.
School of Law
Duquesne University
900 Locust St.
Pittsburg, PA 15282
Telephone: 412-396-6300

JAMES A. BEAVER, ESQ.
School of Law
University of Puget Sound
950 Broadway Plaza
Tacoma, WA 98402
Telephone: 206-591-2273

[ADDITIONAL COUNSEL LISTED ON FOLLOWING PAGES]

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

ROBERT CARTER, ESQ.
School of Law
Rutgers University
15 Washington St.
Newark, NJ 07102
Telephone: 201-648-5216

LLOYD R. COHEN, ESQ.
School of Law
George Mason University
3401 N. Fairfax Dr.
Arlington, VA 22201
Telephone: 703-993-8048

ROBERT COTTROL, ESQ.
School of Law
Rutgers University
5th & Pennsylvania
Camden, NJ 08102
Telephone: 609-225-6397

DONALD A. DRIPPS, ESQ.
School of Law
University of Illinois
504 E. Pennsylvania Ave.
Champaign, IL 61820
Telephone: 217-244-1478

STEPHEN J. HERZBERG, ESQ.
School of Law
University of Wisconsin
Madison, WI 53706
Telephone: 608-263-7419

HENRY MARK HOLZER, ESQ.
Brooklyn Law School
250 Joralemon St.
Brooklyn, NY 11201
Telephone: 718-780-7985

D. BRUCE JOHNSEN, ESQ.
Department of Legal Studies
Wharton School
University of Pennsylvania
Philadelphia, PA 19104-6369
Telephone: 215-898-5401

NICHOLAS J. JOHNSON, ESQ.
School of Law
Fordham University
140 W. 62 St.
New York, NY 10023
Telephone: 212-636-6000

DAVID N. MAYER, ESQ.
School of Law
Capital University
655 S. High St.
Columbus, OH 43215
Telephone: 614-445-8836

DALE A. NANCE, ESQ.
Chicago-Kent Law School
565 W. Adams
Chicago, IL 60661
Telephone: 312-906-5215

JOSEPH E. OLSON
School of Law
Hamline University
1536 Hewitt Ave.
St. Paul, MN 55104
Telephone: 612-641-2142

DANIEL POLSBY, ESQ.
Northwestern University
School of Law
357 E. Chicago Ave.
Chicago, Ill. 60611
Telephone: 312-908-8950

GLENN HARLAN REYNOLDS, ESQ.
University of Tennessee
College of Law
1505 W. Cumberland Ave.
Knoxville, TN 37996
Telephone: 615-974-6744

CHARLES E. RICE, ESQ.
Notre Dame Law School
Notre Dame, Indiana 46556
Telephone: 219-239-5667

WALLACE RUDOLPH, ESQ.
School of Law
University of Puget Sound
950 Broadway Plaza
Tacoma, WA 98402
Telephone: 206-591-2244

JUSTIN SMITH, ESQ.
Hastings College of the Law
200 McAllister St.
San Francisco, CA 94102
Telephone: (415) 565-4657

ROBERT B. SMITH, ESQ.
School of Law
University of Oklahoma
300 Timberdell Rd.
Norman, Oklahoma 73019-0701
Telephone: 405-325-4829

GEORGE STRICKLER, ESQ.
School of Law
Tulane University
Joseph M. Jones Hall
New Orleans, LA 70118
Telephone: 504-865-5939

RICHARD WARNER, ESQ.
Chicago-Kent Law School
565 W. Adams
Chicago, IL 60661
Telephone: 312-906-5340

ROBERT WEISBERG, ESQ.
Stanford Law School
Stanford University
Stanford, CA 94305
Telephone: 415-723-0612
Attorneys for Amici

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AMICUS BRIEF SUPPORTING NEITHER PARTY

INTEREST OF THE AMICI

Both parties in this appeal have graciously consented to the filing of this brief which supports the position of neither party.

1. Amicus ACADEMICS FOR THE SECOND AMENDMENT

ACADEMICS FOR THE SECOND AMENDMENT (A2A) is a not for profit Minnesota corporation headquartered in St. Paul, MN. A2A fosters open, rigorous discussion of the constitutional right to arms. Its purposes include sponsoring legal, historical and philosophical scholarship on the topic and stimulating greater public knowledge and understanding of such scholarship. A2A's specific activities have included the circulation of open letters and other materials among scholars and the sponsorship of scholarly meetings, e.g. one held in connection with the 1994 annual meeting of the American Association of Law Schools in Orlando, FL. Current members of the A2A board are law professors Joseph E. Olson (Hamline), Robert J. Cottrol (Rutgers) and James Viator (Loyola-New Orleans).

Many, but not all, of the signatories of this brief are A2A members.

2. Amicus CONGRESS OF RACIAL EQUALITY

The CONGRESS OF RACIAL EQUALITY (CORE), a nationwide civil rights organization founded in 1942 which enjoys consultative status at the United Nations, is a New York not-for-profit corporation. CORE's first priority is to oppose discrimination in every aspect of American life. In that connection, CORE is well aware that racist motivations often underlie anti-gun laws and have underlain them from colonial times through the present.[1]

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[1] *See, e.g.* the following (all authored or co-authored by authors of the present brief): Cottrol and Diamond, " 'Never Intended to be Applied to the White Population': Firearms Regulation and Racial Disparity, The Redeemed South's Legacy to a National Jurisprudence?" forthcoming in CHICAGO-KENT L. REV. (1995); Cottrol and Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration",

CORE also seeks to rid the Black Community of pathologies afflicting it as a result of slavery and the subsequent century of racial discrimination. Among the most devastating of those pathologies is crime; another is drug abuse. CORE operates programs to prevent drug abuse and to assist the Black community in fighting it and crime in general. CORE has involved itself in the fight against these pathologies because they are the scourge of Black neighborhoods.

CORE joins this amicus brief because of its belief that law abiding responsible adults who are threatened and victimized by crime have the right of lawful self-defense, including the right to possess the arms necessary thereto. CORE encourages law abiding, responsible adults to organize their communities against drug trafficking and insist on police action against drug dealers wherever and whenever they violate our laws. Necessarily the law abiding Black who takes such steps while living in a high crime area becomes a victim of threats and retaliation. Even if the police are not hostile to such a victim because of his/her prior pressure for arrests, the police cannot bodyguard him/her. In this situation it seems not unreasonable for the victim to want weapons to defend his/her home and family comparable to those that might be used to attack them.

3. Amicus NATIONAL ASSOCIATION OF CHIEFS OF POLICE

The NATIONAL ASSOCIATION OF CHIEFS OF POLICE represents over 11,000 command level law

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80 GEORGETOWN L.J. 309 (1990); Kates, "Toward a History of Handgun Prohibition" and Kates and Salter, "The Necessity of Access to Firearms by Dissenters and Minorities Whom Government is Unwilling or Unable to Protect" in D. Kates (ed.) RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT (1979). *See also* S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984).

enforcement officers on the federal, state and local levels nationwide. Its president is Dennis Ray Martin, formerly Chief of Police of Elbee-Maple Grove Township, MI. Its offices are located at 3801 Biscayne Blvd., Miami, Florida 33137, telephone (305)

The ASSOCIATION's interest in the potential Second Amendment issue in this case is based on the ASSOCIATION's belief that the widespread dispersion of arms among the responsible, law abiding adult population deters crime. Moreover, the Association supports the preservation the armed citizenry-cum-unorganized militia system for personal defense because armed citizens and the "unorganized militia" constitute the only effective assistance potentially available to the police when the Army and National Guard are unavailable, e.g. when they are called overseas as they were in World Wars I and II and in the Persian Gulf War.

4. Amicus AMERICAN FEDERATION OF POLICE

The American Federation of Police represents 103,000 rank and file law enforcement officers, security personnel, and citizen crime-watch volunteers. The Federation's major activities involve training on-the-beat patrol officers. Gerald S. Arenberg is Exec. Director. Headquarters are 3801 Biscayne Blvd., Miami, Florida 33137, telephone (305) 573-0202. Its interest in this case is identical to that of amicus NATIONAL ASSOCIATION OF CHIEFS OF POLICE.

5. Amicus SECOND AMENDMENT FOUNDATION

The Second Amendment Foundation, a Washington nonprofit corporation with its headquarters in Bellevue, Washington, is classified as a tax-exempt educational organization under § 501(c)(3) of the Internal Revenue Code and as a public foundation under §§ 170(b)(1)(A)(vi) and

509(a)(1). It works to secure, preserve and expand the right to keep and bear arms.

DISCUSSION

Amici take no position on the correctness of the decision below. Their concern is only to emphasize what this case does not — indeed, could not — concern. As the court below noted, while "some applications of section 922 (q) might raise Second Amendment concerns[, appellant] Lopez does not raise the Second Amendment and thus" the court below did not consider it.[2]

Amici wish to emphasize that even had appellee desired to raise the Second Amendment, he was in no position to do so. For the reasons detailed *infra*: a) the Amendment guarantees an individual right to choose to possess small arms, but b) that guarantee is only to **responsible adults.** It does not accrue to children, felons or the insane. Neither, we hasten to add, does the Second Amendment encompass a right of anyone to keep, carry, or transfer arms for nefarious purposes such as murder, robbery and so forth.

I. THE SECOND AMENDMENT GUARANTEES LAW-ABIDING, RESPONSIBLE ADULTS A PERSONAL RIGHT TO POSSESS ARMS

A. The individual right view is endorsed by the overwhelming majority of modern scholars.

Innumerable politically based pronouncements in non-scholarly sources claim that the Second Amendment does not guarantee a right of individuals, but guarantees only the states' right to arm their militias. That position (which we shall call the "states' right-only" view) is rejected by the great majority of modern legal scholars, *inter alia* because

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[2] *United States v. Lopez*, 2 F.3d 1342, n. 46 (5th Cir. 1993).

the very concept of the Second Amendment as a states' right was completely unknown to the authors of the Bill of Rights (hereinafter described as the Founders or the Founding Fathers).

Of 41 law review articles published since 1980 which offer substantial discussion of the Amendment, just four take the states' right-only position. Their quality does not exceed their quantity: Three of the four articles were written by employees of anti-gun lobbying groups, the fourth by a politician; all appear in minor reviews and **none** were published on their merits — each being in a symposium in which anti-gun groups and/or individuals were invited to submit articles detailing their position.[3]

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[3] Ehrman and Henigan, "The Second Amendment in the 20th Century: Have You Seen Your Militia Lately", 15 U. DAYTON L. REV.5 (1989) and Henigan, "Arms, Anarchy and the Second Amendment", 26 VALPARAISO U. L. REV. 107 (1991) — both written by general counsel of Handgun Control, Inc.; Fields, "Guns, Crime and the Negligent Gun Owner", 10 N. KY. L. R. (1982) (article by non-lawyer lobbyist for the National Coalition to Ban Handguns); Spannaus, "State Firearms Regulation and the Second Amendment", 6 HAMLINE L. R. 383 (1983) (Minnesota attorney general).

In addition, see Beschle, "Reconsidering the Second Amendment: Constitutional Protection for a Right of Security", 9 HAMLINE L. R.69 (1986) (conceding that the Amendment does guarantee a right of personal security, but arguing that that can constitutionally be implemented by banning and confiscating all guns). A somewhat equivocal position is taken in Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L.J. 551 (1991) (the Amendment is an individual right but may not be applicable to present in which only one half of households are armed since its purpose was to insure that the entire populace would be armed).

The article count we have given does not include three other articles: two by authors who disapprove of the constitutional right to arms, but do not seem to deny its existence, Powell, "Capital Punishment, 102 HARV. L. REV. 1035, 1045 (1989) and Brown, "Guns, Cowboys, Philadelphia Mayors, and Civic Republicanism: On Sanford Levinson's 'The Embarrassing Second Amendment' " 99 YALE L. J. 661 (1989);

In contrast, articles accepting the Amendment as an individual right are published on their own merits and in top rank law reviews.[4] The authors include outstanding liberal

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and a third article which simply catalogs the contending positions taken by each side, Becker, "The Politics of Women's Wrongs and the Bill of 'Rights': A Bicentennial Perspective" 59 U. CHI. L. R. 453 (1992).

[4] [THROUGHOUT THIS BRIEF ARTICLES WRITTEN BY SIGNATORIES OF THIS BRIEF ARE MARKED WITH AN ASTERISK] Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 DUKE L. J. 1236 (1994), Amar, "The Bill of Rights and the Fourteenth Amendment", 101 YALE L. J. 1193, 1205-11, 1261-2 (1992); *Kates, "The Second Amendment and the Ideology of Self-Protection" 9 CONST. COMM. 87 (1992); *Cottrol & Diamond, "The Second Amendment: Toward an AfroAmericanist Reconsideration", 80 GEORGETOWN L.J. 309 (1991); Amar, "The Bill of Rights as a Constitution", 100 YALE L. J. 1131, 1164ff. (1990); Levinson, "The Embarrassing Second Amendment", 99 YALE L. J. 637 (1989); *Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143 (1986); Malcolm, Essay Review, 54 GEO. WASHINGTON U. L. REV. 582 (1986); Fussner, Essay Review, 3 CONSTITUTIONAL COMMENTARY 582 (1986); Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986); Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986); *Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 MICH. L. REV. 203 (1983) (hereinafter described as "Original Meaning); *see also* Scarry, "War and the Social Contract: The Right to Bear Arms", 139 U. PA. L. REV. 1257 (1991); Williams, "Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment", 101 YALE L. J. 551 (1991).

The remainder of the 37 individual right articles are in less prestigious law reviews: *Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994) (extensively discussing the Second Amendment in relation to the Tennessee Constitution), Halbrook, "Rationing Firearms Purchases and the Right to Keep Arms" 96 W. VA. L. REV. 1 (1993); Comment: "Gun Control Legislation and the Intent of the Second Amendment: To What Extent is There an Individual Right to keep and Bear Arms?" 37 VILLANOVA L. REV. 1407 (1992); Halbrook, "The

Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment", 26 VALPARAISO L. REV. 131 (1991); Tahmassebi, "Gun Control and Racism", 2 GEO MASON CIV. RTS.L. J. 67 (1991); Bordenet, "The Right to Possess Arms: the Intent of the Framers of the Second Amendment", 21 U.W.L.A. L. REV. 1 (1990); Moncure, "Who is the Militia — The Virginia Ratifying Convention and the Right to Bear Arms", 19 LINC. L. REV. 1 (1990); Lund, "The Second Amendment, Political Liberty and the Right to Self-Preservation", 39 ALA. L. REV. 103 (1987); Morgan, "Assault Rifle Legislation: Unwise and Unconstitutional", 17 AM. J. CRIM. L.143 (1990); Dowlut, "Federal and State Constitutional Guarantees to Arms", 15 U. DAYTON L. REV. 59 (1989); Halbrook, "Encroachments of the Crown on the Liberty of the Subject: Pre-Revolutionary Origins of the Second Amendment, 15 U. DAYTON L. REV. 91 (1989); Hardy, "The Second Amendment and the Historiography of the Bill of Rights", 4 J. LAW & POLITICS 1 (1987); Hardy, "Armed Citizens, Citizen Armies: Toward a Jurisprudence of the Second Amendment", 9 HARV. J. LAW & PUB. POLICY 559 (1986); Dowlut, "The Current Relevancy of Keeping and Bearing Arms", 15 U. BALT. L. FOR. 32 (1984); Malcolm, "The Right of the People to Keep and Bear Arms:The Common Law Tradition", 10 HAST. CONST. L. Q. 285 (1983); Dowlut, "The Right to Arms", 36 OKL. L. REV. 65 (1983); Caplan, "The Right of the Individual to Keep and Bear Arms" 1982 DET. COLL.L. REV. 789; Halbrook, "To Keep and Bear 'Their Private Arms' ", 10 N. KY. L. REV. 13 (1982); A. Gottlieb, "Gun Ownership: A Constitutional Right" 10 N. KY. L. REV. 138 (1982); Gardiner, "To Preserve Liberty — A Look at the Right to Keep and Bear Arms", 10 N. KY. L. REV. 63 (1982); Note, "Gun Control: Is It A Legal and Effective Means of Controlling Firearms in the United States?", 21 WASHBURN L.J. 244 (1982); Halbrook, "The Jurisprudence of the Second and Fourteenth Amendments," 4 GEO MASON L. REV. 1 (1981).

The following treatments in book form also support the individual right position is correct: J. Malcolm, "ARMS FOR THEIR DEFENCE": THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994); *R. Cottrol, GUN CONTROL AND THE CONSTITUTION (Garland, 1993); *Cottrol & Diamond, "Public Safety and the Right to Bear Arms", in D. Bodenhamer & J. Ely, AFTER 200 YEARS; THE BILL OF RIGHTS IN MODERN AMERICA (Ind. U. Press, 1993); *OXFORD COMPANION TO THE UNITED STATES SUPREME COURT (Oxford U. Press,

constitutional scholars such as Akhil Amar, Sanford Levinson and William Van Alstyne — none of whom own guns or expected that the evidence would force this position on them. In his just published piece, Prof. Van Alstyne, a former member of the ACLU national board, describes the individual right/states' right-only debate as being between those who take the Bill of Rights seriously and those who do not.[5]

1992) (entry on the Second Amendment); E. Foner & J. Garrity, READER'S COMPANION TO AMERICAN HISTORY 477-78 (Houghton Mifflin, 1991) (entry on "Guns and Gun Control"); *Kates "Minimalist Interpretation of the Second Amendment" in E. Hickok (ed.), THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING (U. Va. Press, 1991); S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES (Greenwood, 1989); L. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 341 (Macmillan, 1988); D. Hardy, ORIGINS AND DEVELOPMENT OF THE SECOND AMENDMENT (Blacksmith,1986); *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION (Macmillan, 1986) (entry on the Second Amendment); S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984); Marina, "Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective" and Halbrook, "The Second Amendment as a Phenomenon of Classical Political Philosophy" — both in D. Kates (ed.), FIREARMS AND VIOLENCE (1984); Senate Subcomm. on the Constitution of the Comm. on the Judiciary, 97th Cong., 2d Sess., RIGHT TO KEEP AND BEAR ARMS (1982).

[5] Van Alstyne, 43 DUKE L. J. *supra* at 1254-5. Compare Professor Levinson's analysis: If the Second Amendment is to be read out of the Constitution "in the name of social prudence . . . why do we not apply such consequentialist criteria to each and every part of the Bill of Rights? As Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. If protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights were always (or even most of the time) clearly costless to the society as a whole, it would truly be impossible to understand why they would be as controversial as they

B. The text of the Second Amendment clearly guarantees an individual right ("right of the people").

The Amendment describes the right to arms as a "right of the people." As this Court has noted, throughout the Constitution that phrase denotes citizens and their rights against government. *United States v. Verdugo-Urquidez* 494 U.S. 259, 108 L.Ed. 2d 222, 232-33 (1990). Accordingly, "right of the people" is to be construed *in pari materia* in the First, Second and Fourth Amendments. *Id.* Not to construe it *in pari materia* would imply the absurd conclusion: that when Congress drafted the Bill of Rights it used "right of the people" in the First Amendment to mean an individual right; but sixteen words later, it used the same phrase in the Second Amendment to mean a right of the states; but, forty-six words later, the Fourth Amendment used it to mean an individual right, as the Ninth Amendment does also; and then the Tenth Amendment specifically distinguishes "the states" from "the people," even though in the Second Amendment they are identical.

(If the foregoing were not absurd enough, consider the implications were the same nonsensical construction to be applied to the requirement that the House of Representatives shall be selected "by the people of the several states." Constitution, Art. I, § 2, cl. 1. If what "people" actually means is "state", it would seem to follow that the state legislature or Congress would be free to decree that the states' House delegations are to be appointed by the state legislature rather than popularly elected. This would, of course, abrogate the purpose of the House of Representatives by undermining the system established by the original

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are. . . . 'Cost-benefit' analysis, rightly or wrongly, has come to be viewed as a 'conservative' weapon to attack liberal rights. Yet one finds that the tables are strikingly turned when the Second Amendment comes into play." 99 YALE L. J. *supra* at 657-58.

Constitution whereby the House was to be elected by popular vote and the Senate by the state legislatures.)

It bears emphasis that the linkage between the First, Second and Fourth Amendments goes beyond their common usage of the phrase "right of the people." It has been suggested that both conceptually and for specific historical reasons, the Founding Fathers saw the First through Fourth Amendments as closely linked substantive rights — all revolving around the right to arms. *9 CONSTITUTIONAL COMMENTARY 98-103. In fact, the Fourth Amendment maxim that a man's home is his castle originated in cases recognizing the right to use deadly force to repel burglars and arsonists.[6]

C. The very concept of a states' right-only is an anachronism — a concept unknown to the authors of the Bill of Rights.

The very concept that the Second Amendment could be a states' right is an invention of our own Century's gun control debate. The text and the legislative history demonstrate that the Founding Fathers had not even the remotest inkling of such a states' "right" concept, whether in connection with the Amendment, or otherwise. So, for instance, when the Tenth Amendment guarantees prerogatives of the states against federal interference, they are referred to as "powers", not "rights." And the Second Amendment right is not only to keep, but also to "bear" arms. Only individuals "bear" arms. States do not.[7]

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[6] *See Payton v. N.Y.*, 445 U.S. 573, 596, n. 44 (1980) citing *Semayne's Case* and see discussion of other medieval cases to the same effect in *"Original Meaning", 82 MICH. L. REV. *supra* at n. 5.

[7] Prof. Van Alstyne approvingly quotes (43 DUKE L. J. 1243, n. 19) a leading anaylst of the Amendment's history: " 'If anyone entertained [the states' right-only view] in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most

Moreover, Congress had before it when it voted on the Bill of Rights a commentary on them by the Federalist writer Tench Coxe; that commentary, **which was specifically endorsed by James Madison, author of the Bill of Rights,** defined the purpose of the Second Amendment as to guarantee people against the confiscation of "their *private* arms."[8]

Significantly, Madison's own proposal for integrating the Bill of Rights into the Constitution was not to add them at the end (as they have been) but to interlineate them into the portions of the original Constitution they affected or to which they related. If he had thought the central purpose of the Second Amendment revolved around the militia he would have interlineated it in Art. I, § 8, near or after cl. 16. Instead, he planned to insert the right to arms with freedom of religion, the press and other personal rights in § 9 following the rights against bills of attainder and ex post facto laws.[9]

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closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.' " (S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT *supra* at 83). *See generally*, J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (Harvard U. Press, 1994), ch. 8.

[8] Emphasis added. The commentary appeared in Federalist newspapers around the nation, including those in Philadelphia where Congress was then sitting. *See* •"Original Meaning," 82 MICH. L. REV. *supra* at 223-4; the commentary's full discussion of the Second Amendment reads: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow citizens, the people are confirmed by the next article [i.e., amendment] in their right to keep and bear their private arms." *Id.*

[9] •"Original Meaning", 82 MICH. L. REV. *supra* at 223.

As recently as *Planned Parenthood v. Casey*, ____ U.S. ____, 120 L.Ed.2d 674, 696 (1992) this Court has listed the Second Amendment interchangeably with other explicitly guaranteed personal rights.[10] This follows the precedent of the Founders who themselves routinely made the same connection, linking the right to arms with freedom of religion and speech, etc. under such joint descriptions as "private rights", "human rights", "essential and sacred rights" (quoting Madison, Monroe and Gallatin respectively).[11]

Nineteenth Century Americans were equally unaware of even the concept that the right to arms might be a state's right. From the debate on the Fourteenth Amendment and the precedent Civil Rights Act of 1866, their modern historian concludes:

> the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and to bear arms.[12]

19th Century legal and constitutional commentary on the Amendment is epitomized by Justice Story's description of

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[10] In *Moore v. East Cleveland*, a plurality opinion had previously quoted the second Justice Harlan in listing "the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures" as part of the "full scope of liberty" guaranteed by the Constitution. 431 U.S. 494, 502 (1976), quoting *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

[11] For these and numerous other quotes from the 1787-91 debates see "'Original Meaning", 82 MICH. L. REV. *supra* at 223-24 and 228-9, citing original sources.

[12] M. Curtis, NO STATE SHALL ABRIDGE 104 (Duke University Press, 1986); see pp. 52, 53, 56, 72, 88, 140-1 and 164 for debate extolling the right to arms or equating it to free expression, religious liberty, due process, jury trial and against unreasonable search, etc., etc.

it as "The right *of the citizens* to keep and bear arms"[13] and his explanation of its purposes as follows: "One of the ordinary modes, by which tyrants accomplish their purpose without resistance is, by disarming the people and making it an offense to keep arms."[14]

The closest any 19th Century source comes to recognizing even the concept of a states' right is the following **denial** offered by the pre-eminent 19th Century commentator, Thomas Cooley, under the heading "The right is General":

> It may be supposed from the phraseology of [the Second Amendment] that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for that purpose.[15]

To reiterate, the idea of the Second Amendment as something other (or less) than a guarantee of an individual right to arms is a purely 20th Century invention of which

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[13] Emphasis added. J. Story, COMMENTARIES ON THE CONSTITUTION 746 (1833).

[14] J. Story, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 264 (1st pub. 1833, repub., 1893). For other 19th Century constitutional commentators, please see: Prof. Levinson citing Thomas Cooley and Theodore Shroeder to the same effect, 99 YALE L. J. *supra* at 649-70); •"Original Meaning", citing St. G. Tucker (1803) and Rawle (1825) as 18th and 19th Century commentators who endorsed the individual right view without apparent consciousness that any other was possible (82 MICH L.REV. *supra* at 244-247); and •9 CONST. COMMENTARY 87, n. 1 (1992) citing Pomeroy (1868), von Holst (1885), Schouler (1897), J. Tucker (1899), Putney (1908) and Black (1910).

[15] T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-2 (2d ed., 1891, 1st pub. 1880).

prior generations — most especially including the Founders themselves — had no inkling.

D. This Court's decisions consistently treat the Second Amendment as a guarantee of individual right.

In several 19th Century cases this Court refused to enforce the Second Amendment against either the states or private citizens. These holdings were based on the 19th Century refusal to accept the application of any part of the Bill of Rights against the states. It bears emphasis, however, that the opinions' language indicates the Court's consistent recognition that the right to arms was and is an individual constitutional right, albeit one protected only against federal action.[16]

In *United States v. Miller,* 307 U.S. 174 (1939) this Court held that an indictment should not have been dismissed on the blanket theory that any law taxing and requiring registration of sawed-off shotguns violated the Second Amendment *ipso facto.* Partisans of the states' right-

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[16] *United States v. Cruikshank,* 92 U.S. 542, 553 (1875) dismissed an indictment charging that Klansmen deprived blacks of the right "of 'bearing arms for a lawful purpose.' This is [a pre-existing natural right,] not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen [from the Court's identical discussion of the First Amendment right of assembly; 92 U.S. at 552], means no more than that it shall not be infringed by Congress. This is one of the amendments [i.e. the Bill of Rights] that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes. . . ."; *Presser v. Illinois,* 116 U.S. 252, 265 (quoting the foregoing from Cruikshank and holding that neither the First nor Second Amendments apply against the states); *Miller v. Texas,* 153 U.S. 535 (1894) (same: Second and Fourth Amendments); *Robertson v. Baldwin,* 165 U.S. 275, 281-2 (1897) (addressing the Second Amendment indistinguishably from other guarantees of personal rights).

only view have misunderstood this as a holding that the only firearms the Amendment protects are those of the National Guard and/or organized state militias. Though that was what the Solicitor General argued,[17] this Court did not accept that argument — even though it was unopposed because no brief was filed on the other side.

Had the *Miller* court understood the Amendment to be a states' right only, it should, and presumably would, have disposed of the appeal on standing grounds. If gun ownership by ordinary citizens is not protected by the Amendment, Mr. Miller was not in a position to challenge the law under it. But this Court's treatment of the issues in *Miller* accepted that individuals do have standing to invoke the Second Amendment. Thus *Miller* focusses instead on the subsidiary issue of whether a law regulating sawed off shotguns affects the kind of firearms the Amendment protects individuals in possessing. Dealing therefore with Miller's challenge on its merits, the court held that only possession of military-type and/or militarily useful weapons is protected by the Amendment.[18] This holding is based on the Amendment's reference to a militia (which the Court expressly recognized included virtually the whole male pop-

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[17] "Second, the [Solicitor General Robert] Jackson brief argued that the right was a collective one that [only] protected the people when carrying arms as members of the state militia." *1 R. Cottrol, GUN CONTROL AND THE CONSTITUTION xxvii (Introduction) (NY Garland, 1993).

[18] 307 U.S. at 178. In adopting this standard *Miller* expressly cites a 19th Century Tennessee case in which it originated. For a discussion of the cases under the Tennessee Constitution and their relation to the Second Amendment, see *Reynolds, "The Right to Keep and Bear Arms Under the Tennessee Constitution", forthcoming in 61 TENN. L. REV. # 2 (Winter, 1994).

ulation[19]). Having fixed on this military-weapon standard, the court reversed because (for obvious reasons) Miller had not even made an attempt to show that, as a matter of fact, a sawed off shotgun is a military weapon. For equally obvious reasons, in abeyance of such a showing, this Court was not in a position to judicially notice that a sawed off shotgun is (or is not) a military weapon. 307 U.S. at 178.

Lest there be any misunderstanding, we hasten to add that the *Miller* standard is insufficient and significantly inadequate — in that it actually exaggerates the kind of weaponry the Amendment encompasses. Preservation of a militia composed of individually armed citizens was only a part of the Amendment's rationale.[20] The overall rationale was armed self-defense, particularly defense of home and

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[19] 307 U.S. at 179: "The signification attributed to the term 'militia' appears from the debates in the Convention, the history and legislation of the colonies and the states, and the writings of approved commentators. . .[:] all males physically capable of acting in concert for the common defense. . . . [O]rdinarily when called for service these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." Emphasis added.

[20] *See, e.g.* Shalhope, "The Armed Citizen in the Early Republic", 49 LAW & CONTEMP. PROBS. 125 (1986): The Amendment encompassed "two distinct principles: (1) Individuals had the right to possess arms to defend themselves and their property; and (2) states retained the right to maintain militias composed of these individually armed citizens.") and J. Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLOAMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The Second Amendment was meant to accomplish two distinct goals. . . . First, it was meant to guarantee the individual's right to have arms for self-defense and self-preservation. . . . These privately owned arms were meant to serve a larger purpose [militia service] as well . . . and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public . . . the militia [being] . . . the body of the people."

family.[21] That rationale substantially limits the kind of weaponry which might otherwise fall within *Miller*'s holding that the Amendment protects militia-type weaponry. Today

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[21] Not only was this the most basic of natural rights, the possession of arms for that purpose was regarded as basic to the virtue, the **moral** fortitude of a republican citizenry. The Founders "believed that the perpetuation of a republican spirit and character in their society depended upon the freeman's possession of arms as well as his ability and willingness to defend both himself and his society." Shalhope, *supra*, 49 LAW & CONTEMP. PROBS. at 138. See generally *9 CONSTITUTIONAL COMMENTARY *supra* at 94-6: "Arms possession for protection of self, family and polity was both the hallmark of the individual's freedom and one of the two primary factors in his developing the independent, selfreliant, responsible character which classical liberal political philosophers deemed necessary to the citizenry of a free state.*** [π] The Anglo-American legal distinction between free man/armed and unfree/disarmed flowed naturally into the classical liberal view that the survival of free and popular government required citizens of a special character — and that the possession of arms was one of two keys in the development of that character. From Machiavelli and Harrington classical liberal philosophy derived the idea that arms possession and property ownership were the keys to civic *virtu*. In the Greek and Roman republics from whose example they took so many lessons, every free man had been armed so as to be prepared both to defend his family against outlaws and to man the city walls in immediate response to the tocsin warning of approaching enemies. Thus did each citizen commit himself to the fulfillment of both his private and his public responsibilities. [π] The very survival of republican institutions depended upon this moral (as well as physical) commitment — upon the moral and physical strength of the armed freeholder: sturdy, independent, scrupulous, and upright, the self-reliant defender of his life, liberty, family, and polity from outlaws, oppressive officials, despotic government, and foreign invasion alike. That the freeholder might never have to use his arms in such protection mattered naught. (Indeed, one basic tenet classical political theory took from its criminological premises was that of deterrence: if armed and ready, the free man would be least likely ever to actually have to defend. Simply to be armed, and therefore able to protect one's own, was enough; this moral commitment both developed and exemplified the character of the virtuous republican citizen.)"

as in the 18th Century, the basic arms with which one would defend home and family are the same as those with which one would render militia service: ordinary civilian small arms. But the concept of military-type arms could include kinds of arms which would be highly inappropriate for repelling a burglar or rapist: machineguns, bazookas, artillery and so forth. Both the text of the Second Amendment and its core purpose of protecting home and family suggest that while *Miller* is not incorrect as a limitation on the arms the Amendment protect, additional limitations exclude from that protection all but small arms (which must also be of military quality; for the implication that this excludes very cheap, shoddy firearms from the Amendment's protection see *"Original Meaning", 82 MICH. L. REV. *supra*, 260).

E. The implications of the states' right-only view cannot withstand examination.

Professor Van Alstyne actually understates the matter when he characterizes the individual rights vs. states' right-only debate as one between those who do take the Bill of Rights seriously and those who don't. In fact, advocates of the states' right-only view do not even take their own position seriously enough to explore its potential results — which turn out to be at least as socially adverse as those often attributed to the individual right view. In the individual right view the basis of the Second Amendment was the right to arms for personal defense, no distinction being made between apolitical and political crime.[22] Accordingly, as discussed *supra*, both the Amendment's text and the logic of the individual rights view limit the kind of weaponry the Amendment guarantees individuals to small arms only.

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[22] *9 CONSTITUTIONAL COMMENTARY *supra* at 89-103 citing examples and quoting and analyzing Locke, Sidney, Montesquieu, Blackstone, Madison, Jefferson, Paine and numerous others. See discussion and quotations in footnote 20 *supra*.

But the states' right-only view holds that the Amendment was intended to guarantee that states may equip their forces with arms sufficient to counterbalance the military force of the federal government. Thus any **honest**, conscientious treatment of the states' right-only view requires asking: Doesn't this position involve the conclusion that every state may, if it wishes, stockpile not just small arms but artillery, bombers, aircraft carriers, ICBMs and nuclear weapons for the use of its forces?[23] If the proponents of the states' right-only view have some **honest, principled** basis for a negative answer to the foregoing question, they have failed to offer it in their articles. Those articles "answer" such questions by ignoring them. States' right-only articles explore none of that view's implications beyond the naked claim that the Amendment does not preclude government from banning and confiscating all privately owned firearms.

A related question arises from the crucial difference between the two views in defining what "militia" means as that term is used in the Amendment. The individual rights

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[23] Space permits mentioning just one of the textual and logical limitations implicit in the individual view which are inapplicable to the states' right-only view. The Amendment guarantees the right to "keep *and bear* arms": Since an 18th Century man could not bear (i.e. pick up) cannon, the intent seems limited to small arms. By parity of reasoning it would not include even now-portable arms, like bazookas, because they are comparable in destructiveness to an 18th Century cannon.

But that limitation does not apply if the Amendment be deemed to create a states' right to possess military forces against the United States. If one can stomach the incongruity of describing a state as "bearing" arms, that state is obviously no more incapable of "bearing" cannon than any other kind of arms.

For a catalog of textual and logical limitations implied by the individual right view see, e.g. *"Original Meaning", 82 MICH. L. REV. *supra* at 259*ff.* (1983); *Kates, 49 LAW & CONTEMP. PROBS. *supra* at 146-8 and Halbrook, 49 LAW & CONTEMP. PROBS. *supra* at 157-60.

view rests on the preferred 18th Century meaning of "militia" — not some formal military unit, but a **system** under which each household was required to be armed and virtually every military-age male was required to own arms and appear for training and/or service when called to do so.[24] But in the states' right-only view the word "militia" refers to a formal military unit, a body of troops serving the state. Indeed, it is regularly asserted by partisans of that view that the "militia" is the National Guard, notwithstanding this Court's holding in *Perpich v. Department of Defense*, 496 U.S. 334 (1990). But if these claims of the states' right-only analysts are correct, how can one escape the conclusions: a) that the Amendment repeals Art. I § 10, cl. 3, of the original Constitution which forbids states to "keep troops" without the consent of Congress; and b) that *Perpich* was wrongly decided, a cognate effect of the Amendment having been to modify Art. I, § 8, cls. 15 and 16 by exalting state power over the militia vis-a-vis federal?[25]

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[24] "Original Meaning", 82 MICH. L. REV. *supra* at 214-8 ("In short, one purpose of the Founders having been to guarantee the arms of the militia, they accomplished that purpose by guaranteeing the arms of the individuals who made up the militia." *Id.* at 215), Shalhope, 49 LAW & CONTEMP. PROB. *supra* at 133 ("Individuals had the right to possess arms to defend themselves and their property; and states retained the right to maintain militias composed of these individually armed citizens."). *See also* note 18 *supra* and Amar, 100 YALE L. J. *supra* at 1166 as quoted in note 25 *infra*.

[25] In fact, the concept of militia held by partisans of the states' right-only view is simply not the "militia" concept to which the Amendment refers: "Nowadays, it is quite common to speak loosely of the National Guard as 'the state militia,' but 200 years ago, any band of paid, semi-professional part-time volunteers, like today's Guard, would have been called 'a *select* corps' or '*select* militia' — and viewed in many quarters as little better than a standing army. In 1789, when used without any qualifying adjective, 'the militia' referred to all Citizens capable of bearing arms. . . . [So] 'the militia' is identical to 'the people'. . . ." Amar, *supra*, 100 YALE L. J. at 1166, emphasis in original. *See also*: J.

To reiterate, partisans of the states' right-only view have not even attempted to grapple with these questions. Though their articles purport to champion a states' right view, in fact it is just a makeweight — a disingenuous gibberish-concept which is presented without analysis of its content or implications solely to evade the inconvenient truth that the Amendment precludes the prohibition and confiscation of all firearms.

II. ALTHOUGH THE RIGHT ENCOMPASSES RESPONSIBLE ADULTS, NEITHER CHILDREN, FELONS NOR THE MENTALLY UNBALANCED HAVE ANY RIGHT TO ARMS UNDER THE SECOND AMENDMENT

While the constitutional right to arms extends to those who were exempt from mandatory performance of militia duties (women, seamen, clergymen and men beyond the upper age for service), it does not extend to those **excluded** from such service, i.e. felons, the insane and children.[26] Concomitantly, in

> classical republican political philosophy, the concept of a right to arms was inextricably and multifariously tied to that of the "virtuous citizen." Free and republican

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Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 162-3 (Harvard U. Press, 1994): "The argument that today's National Guardsmen, members of a select militia, would constitute the *only* persons entitled to keep and bear arms has no historical foundation. [Emphasis in original.]"

[26] It should be noted that those exempt from being called to militia duty (whether to drill, for police/watch purposes or for actual service in the field) were not thereby exempt from the militia laws' separate and independent requirement that every law abiding, responsible adult be armed: "the duty to keep arms applied to *every* household, not just those containing persons subject to militia service. Thus the over-aged and seamen, who were exempt from militia service, were required to keep arms for law enforcement and for the defense of their homes from criminals or foreign enemies." *"Original Meaning", 82 MICH. L.

> institutions were believed to be dependent upon civic *virtu* which, in turn, depended upon each citizen being armed — and, therefore, fearless, self-reliant and upright. Since possession of arms was the hallmark of a citizen's independence, the ultimate expression of civic *virtu* was his defensive use of arms against criminals, oppressive officials and foreign enemies alike. One implication of this emphasis on the virtuous citizen is that *the right to arms does not preclude laws disarming the unvirtuous (i.e. criminals) or those who, like children or the mentally unbalanced, are deemed incapable of virtue.*[27]

Felons, children and the insane were no more included in the right to arms than in the franchise, the two being "intimately linked" in the thinking of the Founding Fathers and prior and subsequent republican theorists.[28] *See also* discussion in "The Right to Arms", 36 OKL. L. REV. *supra* at 96 and of the same exclusion from state constitutional right to arms provisions in Dowlut & Knoop, "State Constitutions and the Right to Keep and Bear Arms", 7 OKLH. CITY U. L. REV. 177, n. 71 at p. 192 (1982).

REV. *supra*, 215-6 (citing laws requiring arms for all but magistrates and clergymen).

[27] Emphasis added: *Kates, "The Second Amendment: A Dialogue", 49 LAW & CONTEMP. PROBS. 143, 146 (1986). *See generally* Halbrook, "What the Framers Intended: A Linguistic Interpretation of the Second Amendment", 49 LAW & CONTEMP. PROBS. 153 (1986).

[28] Amar, 100 YALE L. J. *supra* 1164, at fn. 152; *"Original Meaning", 82 MICH L. REV. *supra* 232 at fn. 118; for examples *see* S. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 62-3, 108 (Greenwood, 1989).

Last, but certainly not least, the constitutional right to arms is the right to have them only for the purposes contemplated by the Amendment, such as self-defense, service in the militia and the *posse comitatus* and, incidentally, for other innocent purposes (target shooting, hunting, collection). Regardless of a person's age, there is no right to have, to carry or to transfer weapons for nefarious purposes such as murder, robbery, rape and so forth.

In sum, appellee Lopez herein could not have challenged Title 18 U.S.C. § 922(q) under the Second Amendment right to arms because that Amendment does not include children within its purview nor does it include the nefarious purposes which motivated appellee.

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Respectfully submitted,

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Don B. Kates